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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
 )  
Policy and Rules Concerning the )  
Interstate, Interexchange Marketplace )  
 )  
 )  
Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

CC Docket No. 96-61

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REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

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## SUMMARY

Regardless of any actions it may take concerning independent LECs, the Commission should adopt the safeguards for BOC provision of out-of-region services proposed in the *BOC Out-of-Region NPRM*. There are strong reasons to adopt the proposed safeguards and the BOCs' objections are insubstantial.

The BOCs largely repeat their arguments in the out-of-region proceeding, but those arguments already have been proven wrong. The 1996 Act does not affect the Commission's authority to adopt appropriate safeguards. At the same time, the record in both this proceeding and the out-of-region proceeding shows there is a need for safeguards.

The BOCs also attempt an antitrust analysis. That analysis fails to account for their bottleneck control of access. BOC market share in the long distance market is irrelevant in light of their control of this essential input to long distance service. The BOCs also mistakenly apply the higher standards used to determine whether traditional antitrust remedies should be invoked, rather than the public interest standard the Commission should use to determine whether safeguards are appropriate. Given the potential for anticompetitive BOC behavior and the high costs such behavior would impose on consumers and competition, there is no doubt that the proposed safeguards meet the public interest test.

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CC Docket No. 96-61

To: The Commission

**REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.**

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding.<sup>1/</sup>

**I. Introduction**

The Commission now has a full record to support requiring appropriate safeguards for BOC provision of out-of-region and "incidental" interstate interexchange services. As demonstrated in Vanguard's comments in the *BOC Out-of-Region* proceeding and in this proceeding, the safeguards for BOC out-of-region interexchange services as proposed in the *BOC Out-of-Region NPRM* are the minimum precautions necessary to protect consumers and

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<sup>1/</sup> Notice of Proposed Rulemaking, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Dkt. No. 96-61, (rel. March 26, 1996) (the "Notice").

guard against anticompetitive behavior.<sup>2/</sup> The BOCs' legal and factual arguments against adoption of these minimal safeguards are meritless.

## **II. BOC Legal and Economic Arguments Regarding the Proposed Safeguards Are Unavailing.**

The BOCs have provided the Commission with no new legal or economic arguments against requiring a separate subsidiary or dominant carrier treatment for BOC provision of out-of-region interexchange service. Vanguard demonstrated in its comments that safeguards are necessary because of BOC monopoly power in local access services. The BOCs have not responded to the claims of anticompetitive conduct except to say they are more imagined than real.<sup>3/</sup> Nowhere have they refuted the argument that bottleneck control over local facilities provides an incentive and ability to engage in anticompetitive behavior; nor have they responded to the specific allegations of anticompetitive conduct raised in the *BOC Out-of-Region* proceeding.<sup>4/</sup>

In particular, the BOC legal arguments amount to a mere repetition of their claims in the BOC out-of-region proceeding, and are no more valid now than they were in that proceeding. As shown in Vanguard's comments, the 1996 Act has no effect on the Commission's power to adopt safeguards, including a separate subsidiary. In any event, the Commission has not proposed to require a separate subsidiary, but only to allow BOCs to use

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<sup>2/</sup> *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange, Services*, Notice of Proposed Rulemaking, CC Docket No. 96-21, FCC 96-59 (rel. Feb. 14, 1996) (*BOC Out-of-Region NPRM*).

<sup>3/</sup> See Ameritech Comments at 9; Bell Atlantic Comments at 3.

<sup>4/</sup> See Vanguard Comments at 10.

separate subsidiaries as an alternative to dominant carrier regulation.<sup>5/</sup> Thus, it is apparent that the Commission has the legal authority to adopt the safeguards proposed in the *BOC Out-of-Region NPRM*.

### **III. The BOCs Employ a Misguided Antitrust Analysis Which Focuses on Market Share Rather than Leveraged Market Power.**

The BOCs attempt to persuade the Commission that lack of market share in the interexchange market suggests a lack of market power.<sup>6/</sup> The Commission should not be persuaded by this oversimplified analysis which ignores the most important indicia of BOC market power. Indeed, the BOCs fail to account for the significance of their bottleneck control over an essential input to long distance service. They also incorrectly apply traditional antitrust standards in their analysis, rather than focusing on the Commission's broader obligation to protect the public interest.

The BOCs argue that they lack market power because they have no market share. However, a BOC's market share in the interexchange market is not relevant to the question of whether it should be subject to safeguards when it enters the interexchange market. Market share analyses are unnecessary when the presence of market power is obvious — as it clearly is in the BOC controlled local access market.<sup>7/</sup> As Vanguard showed in its earlier

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<sup>5/</sup> One BOC recognizes the Commission's authority to adopt appropriate safeguards. Ameritech notes that requiring a separate subsidiary as a precondition for nondominant status at most amounts to a *de facto* requirement that is *not* precluded by the 1996 Act. Ameritech Comments at 10.

<sup>6/</sup> Ameritech Comments at 9; PacTel Comments at 8; NYNEX Comments at 3; GTE Comments at 7.

<sup>7/</sup> Courts reviewing essential facility cases do not adopt the BOCs' single-minded focus on market share. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 373-375 (7th Cir. 1986); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 375 (1973).

comments, even small distortions in the access market brought about by BOC anticompetitive behavior could have significant effects on the long distance market.<sup>8/</sup> Therefore, the Commission should not allow unseparated BOC entry into the interexchange market to distort the vigorous interexchange competition that has developed over the last twelve years.

The BOCs argument that zero market share in the interexchange market means there is no market power is akin to arguing that DeBeers entering the retail diamond engagement ring business or OPEC entering the retail gasoline business would be unable to manipulate or control output in their respective downstream markets. In those cases, there would be no question that safeguards would be appropriate. The only difference is that the BOCs actually have much more market power than DeBeers in the diamond business or OPEC in the oil business because both DeBeers and OPEC have competitors in their respective markets. BOCs control upwards of 97 per cent of the access business.<sup>9/</sup>

Moreover, other LECs agree that BOC entry into the interexchange market poses a much greater risk than independent LEC entry into the interexchange market. GTE notes that independent LECs do not create a risk of anticompetitive behavior because they do not control large contiguous geographical areas, operate in major metropolitan areas or service

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<sup>8/</sup> Vanguard Comments at 11.

<sup>9/</sup> Common Carrier Bureau, "Common Carrier Competition" (Spring, 1995). Ameritech claims that the Commission's implementation of Sections 251 and 252 of the 1996 Act, bottleneck control over local facilities is "quickly dissipating." Ameritech Comments at 7. While Vanguard eagerly awaits true local exchange competition, it has plainly not yet arrived. Indeed, final rules to permit competition will not be adopted until August of this year. Even after that date, there is no guarantee that BOCs will end the practice of raising their rivals' costs through unreasonable interconnection charges or discriminatory access to local facilities. Likewise, there is no guarantee that competition will proceed uniformly in all states. The local access services market cannot be deemed competitive just because the 1996 Act no longer legally precludes competition.

point-to-point markets with their own facilities.<sup>10/</sup> BOCs, on the other hand, do serve large contiguous geographical areas and operate in major metropolitan areas. Given recent merger announcements — particularly a Bell Atlantic - NYNEX BOC combination — the risks of anticompetitive consequences are steadily increasing.

Finally, as noted above, the BOCs' antitrust analysis also does not apply the appropriate legal standard. Several BOCs suggest that the Commission must find that control over local access facilities will produce or threaten to produce market power in the interexchange market in order to impose structural separation requirements.<sup>11/</sup> These BOCs confuse legal standards governing antitrust remedies with the public interest standard that governs Commission decisions. Vanguard does not suggest that antitrust precedent and concepts are irrelevant to the Commission's deliberations, but only that the Commission's public interest determinations are not bound by a traditional, pure antitrust analysis.<sup>12/</sup> Rather, the Commission is responsible for fashioning safeguards to prevent both injuries cognizable under antitrust law and, as a separate matter, injuries to consumers that would result from increased prices or other anticompetitive conduct. Thus, any Commission decision can and must take into account the ability and incentive of the BOCs to engage in anticompetitive behavior that affects the interexchange marketplace.

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<sup>10/</sup> GTE Comments at 8; *See also* SNET Comments at 15.

<sup>11/</sup> Ameritech Comments at 7; USWest Comments at 8.

<sup>12/</sup> Indeed, the D.C. Circuit has held that the Commission is required to consider anticompetitive effects as one part of its public interest finding. *See Western Union Corp. & Hughes Communications Galaxy, Inc.*, Application for Consent to Assignment of License, 3 FCC Rcd. 6792, 6794 (1988).



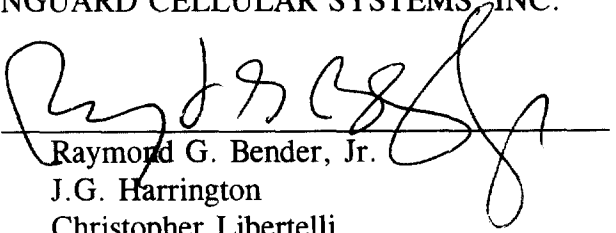
#### IV. Conclusion

The Commission has proposed reasonable safeguards for BOC provision of out-of-region interexchange services. No commenting party has provided the Commission with evidence that the proposed safeguards are unnecessary or ill-advised. The safeguards are especially important in the CMRS context, where the BOCs have additional incentives and greater ability to engage in anticompetitive behavior. Moreover, the proposed safeguards are the minimum precautions necessary to protect consumers and competition, and they impose a minor burden only on BOC provision of interexchange service. For all these reasons, Vanguard Cellular Systems, Inc. urges the Commission to apply the current safeguards for independent LECs to BOC provision of out-of-region and incidental interexchange services, regardless of any changes in the rules governing independent LECs.

Respectfully submitted,

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